

**United States Court of Appeals**  
**FOR THE EIGHTH CIRCUIT**

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No. 01-2751

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Tamara L. Heimbuch,  
  
Appellant,

v.

David Cummins, Dr.,  
  
Appellee.

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Appeal from the United States  
District Court for the Eastern  
District of Arkansas.

[UNPUBLISHED]

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Submitted: November 7, 2001

Filed: December 5, 2001

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Before McMILLIAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

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PER CURIAM.

Tamara Heimbuch filed pro se a medical malpractice action against Dr. David Cummins in May 2000. She then failed to comply with a scheduling order directing her to provide the court with a witness list by April 23, 2001. The order warned that her lawsuit could be “dismissed without prejudice” if she failed to respond to any communication of the court within thirty days, and that the suit would be subject to dismissal for failure to prosecute if she did not respond to the order by the April deadline. Although Ms. Heimbuch timely sent opposing counsel answers to interrogatories that included the names and addresses of her witnesses, she was thereafter unresponsive to counsel’s repeated written requests to proceed with

discovery. In May 2001, the district court<sup>1</sup> dismissed the action with prejudice for failure to prosecute. Ms. Heimbuch appeals, arguing that dismissal with prejudice was unjust because (1) the scheduling order warned only that her suit would be dismissed without prejudice, (2) opposing counsel had not been prejudiced as she had timely sent counsel a witness list, and (3) dismissal with prejudice was a disproportionately harsh sanction in this case.

Given Ms. Heimbuch's failure to comply with the scheduling order and discovery requests, we find no abuse of discretion in the dismissal of the complaint. See Rodgers v. Curators of Univ. of Mo., 135 F.3d 1216, 1219 (8th Cir. 1998) (standard of review). We believe, however, that the dismissal should have been without prejudice, and we so modify it. See Givens v. A.H. Robins Co., 751 F.2d 261, 263 (8th Cir. 1984) (dismissal with prejudice is extreme sanction, and is not justified by every failure to comply with court order).

Accordingly, we affirm the dismissal as modified. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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<sup>1</sup>The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.